HANSON BRIDGETT LLP
RAYMOND H. SHEEN, SBN 194598
rsheen@hansonbridgett.com
CANDICE P. SHIH, SBN 294251
cshih@hansonbridgett.com
425 Market Street, 26th Floor
San Francisco, California 94105
Telephone: (415) 777-3200
Facsimile: (415) 541-9366

Attorneys for Plaintiff
FITBIT, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FITBIT, INC.,

Plaintiff,

v.

FEDERAL INSURANCE COMPANY,

Defendant.

Case No.

COMPLAINT FOR BREACH OF CONTRACT, DECLARATORY RELIEF, AND BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

DEMAND FOR JURY TRIAL

Plaintiff Fitbit, Inc. ("Fitbit") hereby states, by and for its complaint against Defendant Federal Insurance Company ("Federal"), as follows:

1. This insurance coverage dispute concerns Federal's obligations in connection with a trademark lawsuit filed against Fitbit. That lawsuit is entitled *Fitbug Limited v. Fitbit, Inc.*, U.S. District Court, Northern District of California, Case No. C-13-1418 (the "Underlying Lawsuit" or the "Fitbug Lawsuit").

2. Federal issued a series of commercial general liability and umbrella liability policies to Fitbit. The Underlying Lawsuit is covered under the Federal policies. Indeed, Federal originally admitted that this was the case, conceding that the Underlying Lawsuit alleged "advertising injury" within the meaning of the policies. On this basis, Federal agreed to defend Fitbit. However, Federal never paid any of Fitbit's defense costs. Instead, Federal reversed course and denied owing any duty to defend Fitbit. Accordingly, Fitbit has filed this lawsuit

seeking damages and declaratory relief arising from Federal's wrongful coverage positions and breaches of contract.

I. THE PARTIES

3. Fitbit is a corporation organized and existing under the laws of the State of California, with its principal executive offices located at 405 Howard Street, Suite 550, San Francisco, California 94105. Fitbit makes wearable connected health and fitness trackers. The Fitbit platform combines connected health and fitness devices with software and services, including an online dashboard and mobile apps.

4. Fitbit is informed and believes that Defendant Federal Insurance Company is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business in New Jersey. Federal is part of the Chubb Group of Insurance Companies.

II. JURISDICTION

5. This Court has jurisdiction over this action pursuant to the provisions of 28 U.S.C. § 1332 because the parties are citizens of different states and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs.

III. VENUE

6. This Court is the proper venue for this action under 28 U.S.C. § 1391(b)(2) because, among other things, a substantial part of the events and omissions giving rise to this insurance coverage lawsuit occurred in this District. For example, the Underlying Lawsuit was litigated in this District.

IV. INTRADISTRICT ASSIGNMENT

7. Fitbit requests assignment to the San Francisco Division of this Court on the grounds that a substantial part of the events giving rise to this action occurred within the City and County of San Francisco.

V. THE POLICIES

8. Fitbit obtained a series of commercial general liability ("CGL") and umbrella liability policies (collectively, the "Policies") from Federal. The Policies have policy periods covering the four years from April 17, 2009 through April 17, 2013.

9. Fitbit paid Federal substantial premiums for the Policies. Fitbit has fully performed and complied with all of the applicable terms and conditions of the Policies.

10. The first of the Policies bears the policy number of 3592-04-67 SFO and has a policy period of April 17, 2009 to April 17, 2010 (the "2009-10 Policy"). True and correct copies of excerpts from the 2009-10 Policy are attached here to as Exhibit 1, and its contents are incorporated herein by reference. The subsequent Fitbit Policies have terms and conditions substantially similar to the 2009-10 Policy.

11. Under the Policies, Federal has "the right and duty to defend the **insured** against a **suit**" for "**advertising injury**." Exh. 1 at F-007, F-005. Further, Federal must defend Fitbit "even if such **suit** is false, fraudulent or groundless." *Id.* at F-007.

12. The Policies define "advertising injury" to include:

> injury . . . sustained by a [third-party] and caused by an offense of infringing, in that particular part of [Fitbit's] **advertisement**[,] about [Fitbit's] goods, products or services, upon [the third-party's] . . . registered trademarked name, slogan, symbol or title.

Exh. 1 at F-033.

13. The Policies define "advertisement" to include "an electronic, oral, written or other notice, about goods, products or services, designed for the specific purpose of attracting the general public or a specific market segment to use such goods, products or services." Exh. 1 at F-033.

VI. THE UNDERLYING LAWSUIT

14. On March 29, 2013, Fitbug Limited ("Fitbug") filed the Underlying Lawsuit in this Court. A true and correct copy of the complaint is attached hereto as Exhibit 2.

15. Fitbug alleged trademark claims based on acts and circumstances commencing when Fitbit "began distributing" Fitbit's products or services "in or about late 2009 or early 2010." Exhibit 2, ¶ 14.

16. Fitbit vigorously disputed Fitbug's allegations. Trial was scheduled for February 2015. Two weeks before trial, the Honorable Samuel Conti of this Court granted summary judgment in Fitbit's favor, ruling that laches barred all of Fitbug's claims.

17. Fitbug appealed to the Ninth Circuit. However, after Fitbug filed its opening brief, the parties settled.

VII. FEDERAL'S WRONGFUL FAILURE TO ACCEPT ITS DUTIES TO FITBIT

18. Fitbit timely and properly notified Federal of the Underlying Lawsuit and requested that Federal provide a defense to Fitbit. In June 2013, Federal agreed to defend Fitbit based on Fitbug's allegations of covered "advertising injury."

19. However, Federal never paid any of Fitbit's defense costs. A few months later, in a letter dated October 14, 2013, Federal reversed course and refused to defend Fitbit.

20. Federal has continued to deny coverage to Fitbit on the basis of a "prior offense" exclusion in the Policies, which excludes coverage for "**advertising injury** . . . arising out of any offense first committed before the beginning of the policy period." However, at the time of Fitbit's initial tender—and to this day—Federal has admitted that the Fitbug complaint did not allege any misconduct by Fitbit, or injury to Fitbug, prior to September 2009.

21. For these reasons and others, Federal's refusal to defend Fitbit was wrongful, and constituted breaches of the Policies. As a result, Fitbit has incurred substantial attorneys' fees and costs in connection with the Underlying Lawsuit, as well as other damages, in excess of $75,000.

FIRST CAUSE OF ACTION

(BREACH OF CONTRACT – DUTY TO DEFEND)

22. Fitbit repeats and re-alleges the allegations set forth in paragraphs 1 through 21 as if fully set forth herein.

23. Under the Policies, Federal is obligated to defend Fitbit in connection with the Underlying Lawsuit.

24. Fitbit has complied fully with all the terms and conditions of the Policies, and has fulfilled each obligation on its part to be performed.

25. However, Federal has refused to defend Fitbit in the Underlying Lawsuit. Federal's positions and actions constitute breaches of Federal's duties under the Policies.

26. As a direct and proximate result of Federal's breaches of contract, Fitbit has been injured and damaged in an amount in excess of $75,000, and to be proven at trial.

SECOND CAUSE OF ACTION

(DECLARATORY RELIEF – DUTY TO DEFEND)

27. Fitbit repeats and re-alleges the allegations set forth in paragraphs 1 through 26 as if fully set forth herein.

28. Under the Policies, Federal owed a duty to defend Fitbit in connection with the Underlying Lawsuit. However, Federal disputes this position and denies owing any defense obligation to Fitbit.

29. By reason of the foregoing, an actual and justiciable controversy presently exists between Fitbit on the one hand, and Federal on the other hand, with respect to Federal's obligations to defend Fitbit in connection with the Underlying Lawsuit. Fitbit does not mean to imply, nor does it imply, that the positions taken by Federal are reasonable and appropriate. To the contrary, Fitbit contends that Federal takes its positions vexatiously and in bad faith. Nevertheless, Fitbit seeks a declaration that Federal was obligated to defend Fitbit in connection with the Underlying Lawsuit, as well as additional declarations with respect to the nature and scope of Federal's obligations under the Policies.

THIRD CAUSE OF ACTION

(BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING)

30. Fitbit repeats and re-alleges the allegations set forth in paragraphs 1 through 29 as if fully set forth herein.

31. Federal at all material times had a duty to act fairly and in good faith to Fitbit in carrying out its responsibilities under the Policies. Part of Federal's obligations to act fairly and in good faith toward Fitbit are its duties to promptly and fairly respond to claims and requests of the insured and to make reasonable, good faith evaluations and decisions concerning such claims and requests. The implied covenant of good faith and fair dealing further constituted promises and obligations on the part of Federal that it would do nothing to injure, frustrate or interfere with Fitbit's rights to receive the benefits of these Policies.

32. Federal has breached the implied covenant of good faith and fair dealing by engaging in a continuous course of conduct of wrongfully and vexatiously refusing to provide a

defense in connection with the Underlying Lawsuit. In contravention of its duties and obligations, Federal, among other things:

- unreasonably has failed to provide Fitbit with a defense in the Underlying Lawsuit, without proper cause and without regard to the provisions of the Policies, relevant case law, or the allegations of the Underlying Lawsuit;
- unreasonably has failed to provide a defense based on its desire to enrich itself and reduce or avoid its obligations to Fitbit;
- has refused and failed to provide insurance benefits at a time when Federal knew or reasonably should have known that Fitbit was entitled to them;
- has refused to provide a defense with the intention of causing Fitbit to forego legal rights under the Policies;
- placed its own interests ahead of the interests of its insured, Fitbit; and
- has taken other actions to injure, and which have injured, the interests of Fitbit.

33. As a direct and proximate result of Federal's breaches, Fitbit has suffered and continues to suffer substantial damages in an amount to be determined at trial. For example, Fitbit has incurred and continues to incur significant, recoverable attorneys' fees and costs to obtain the benefits to which it is entitled and which Federal wrongfully has denied under the Policies.

34. Federal has acted towards Fitbit in a despicable manner with a willful and conscious disregard of Fitbit's rights, which has subjected Fitbit to cruel and unjust hardship, thereby constituting oppression, fraud or malice and justifying punitive and exemplary damages in an amount to be determined at trial, sufficient to punish Federal for its despicable conduct. Fitbit is informed and believes and thereon alleges that Federal's acts were performed and/or ratified by their managerial employees and affiliated entities, all of whom acted pursuant to a common plan, and with knowledge that Federal's conduct would cause Fitbit harm.

PRAYER FOR RELIEF

Wherefore, Fitbit prays that judgment be entered against Federal as follows:

1. For damages in an amount to be proved at trial;
2. For all other benefits of the Policies according to proof;

3. For a declaration that Federal owed a duty to defend Fitbit in the Underlying Lawsuit, and for further declarations regarding the nature and scope of Federal's obligations under the Policies;

4. For attorneys' fees and costs incurred in connection with this action and in obtaining coverage benefits to which Fitbit is entitled, pursuant to *Brandt v. Superior Court,* 37 Cal.3d 813 (1985);

5. For punitive damages in an amount appropriate to punish Federal;

6. For prejudgment interest;

7. For costs of suit; and

8. For such other and further relief as the Court may deem just and proper.

DATED: November 23, 2016

HANSON BRIDGETT LLP

By: ______________________
RAYMOND H. SHEEN

Attorneys for Plaintiff
FITBIT, INC.

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DEMAND FOR JURY TRIAL

Plaintiff Fitbit, Inc. hereby demands a trial by jury as provided by Rule 38 of the Federal Rules of Civil Procedure.

DATED: November 23, 2016

HANSON BRIDGETT LLP

By: ______________________
RAYMOND H. SHEEN

Attorneys for PLAINTIFF
FITBIT, INC.

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